

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel. W.A.  
DREW EDMONDSON, in his capacity as  
ATTORNEY GENERAL OF THE  
STATE OF OKLAHOMA AND  
OKLAHOMA SECRETARY OF THE  
ENVIRONMENT C. MILES TOLBERT,  
in his capacity as the TRUSTEE FOR  
NATURAL RESOURCES FOR THE  
STATE OF OKLAHOMA**

**PLAINTIFFS**

**v.**

**CASE NO.: 05-CV-00329 GKF –SAJ**

**TYSON FOODS, INC., TYSON  
POULTRY, INC., TYSON CHICKEN,  
INC., COBB-VANTRESS, INC.,  
AVIAGEN, INC., CAL-MAINE FOODS,  
INC., CAL-MAINE FARMS, INC.  
CARGILL, INC., CARGILL TURKEY  
PRODUCTION, LLC, GEORGE’S,  
INC., GEORGE’S FARMS, INC.,  
PETERSON FARMS, INC., SIMMONS  
FOODS, INC. and WILLOW BROOK  
FOODS, INC.**

**DEFENDANTS**

**TYSON FOODS, INC.’S MOTION FOR RULE 37(a)(4)( A)  
EXPENSES AND ATTORNEYS’ FEES**

Defendant Tyson Foods, Inc. (“Tyson”) moves the Court pursuant to FED. R. CIV. P. 37(a)(4)(A) to order Plaintiffs to reimburse Tyson for reasonable expenses, including attorneys’ fees, incurred in connection with its Second Motion to Compel (Dkt. No. 1258).

**I. INTRODUCTION**

Since this lawsuit was filed, Tyson has diligently sought to discover the scope and nature of Plaintiffs’ claims and the factual basis, if any, for their allegations. For more than two years, Plaintiffs have intransigently refused to comply with their discovery obligations under the

Federal Rules. Plaintiffs' willful discovery violations have resulted in numerous discovery disputes, *see, e.g.*, Cobb-Vantress First Motion to Compel (Dkt. No. 743); Tyson Defendants Motion to Compel (Dkt. No. 1019); Cargill Motion to Compel (Dkt. No. 902); Cal-Maine Motion to Compel (Dkt. No. 1054), and several Orders from this Court. *See, e.g.*, January 17, 2007 Order (Dkt. No. 1016) (ordering Plaintiffs to produce sampling data); February 26, 2007 Order (Dkt. No. 1063) (ordering Plaintiffs to respond to Tyson Defendants' interrogatories), and May 17, 2007 Order (Dkt. No. 1150) (ordering Plaintiffs to respond to Cargill Defendants' interrogatories and to specifically identify documents responsive to Rule 34 requests for production).

Notwithstanding this Court's Orders and the clear requirements of the Federal Rules, Plaintiffs continued to obstruct all legitimate discovery, forcing Tyson to file its Second Motion to Compel on September 5, 2007. *See* Dkt. No. 1258. Through its Second Motion to Compel, Tyson established that Plaintiffs' responses to Requests for Production served by Tyson on April 25, 2007, violated FED. R. CIV. P. 34 and this Court's May 17, 2007 Order. Those responses included improper blanket claims of privilege or work-product, unfounded burden objections and generic references to Plaintiffs' one million page "agency document production" in clear defiance of the standard announced by the Court in its May 17, 2007 Order (Dkt. No. 1150). Tyson reminded Plaintiffs of their obligations under the Federal Rules and this Court's May 17, 2007, Order in writing and in a telephonic meet and confer session prior to filing the Second Motion to Compel. Nonetheless, Plaintiffs refused to correct their clearly deficient responses. *See* Dkt. No. 1150, Second Motion to Compel, p. 6 and Ex. 2 (July 3, 2007, Correspondence from R. George to B. Nance) thereto.

On September 27, 2007, this Court heard argument on Tyson's Second Motion to Compel. Sept. 27, 2007, Hrg. Tr., pp. 65-100. Following arguments from Tyson and the Plaintiffs, the Court granted the motion and issued an order tracking the language found on page 7 of the Order found at Dkt. No. 1150.<sup>1</sup> Sept. 27, 2007, Hrg. Tr., p. 97; Oct. 24, 2007, Opinion and Order, at pp. 4-5 (Dkt. No. 1336). The Court also granted Tyson leave to file an application for fees and expenses pursuant to Rule 37. Sept. 27, 2007, Hrg. Tr., p. 100.

## II. ARGUMENT

When one party unjustifiably forces another party to pursue a motion to compel in order to obtain discovery responses that conform to the Federal Rules, the party prevailing on the motion to compel is entitled to an award of the attorneys' fees and expenses incurred in bringing the motion to compel. *Fondren v. Republic American Life Ins. Co.*, 190 F.R.D. 597 (N.D. Okla. 1999). Rule 37(a)(4)(A) provides that:

If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(a)(4)(A). The provision for awards of fees and expenses under Rule 37(a)(4)(A) is intended to deter gamesmanship in discovery and to prevent the waste of judicial and party resources caused by such abuses. "The rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the

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<sup>1</sup> The Hearing transcript refers to the May 17, 2007, Order as Docket Number 1050. Docket Number 1050 consists of Tyson Defendants' Reply on Motion to Compel and not an order of the Court. The correct docket number for the order is 1150, which refers to the May 17, 2007, Order and Opinion of the Court.

potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.”

FEDERAL RULES COMMITTEE ADVISORY NOTE, 1970 Amendment to Rule 37(a)(4).

Tyson’s Second Motion to Compel represents that third occasion on which Plaintiffs have forced the Tyson Defendants to bring a motion to compel to address Plaintiffs’ refusal to comply with their discovery obligations under the Federal Rules. *See also*, Cobb-Vantress First Motion to Compel (Dkt. No. 743); Tyson Defendants Motion to Compel (Dkt. No. 1019). Despite prevailing on two prior motions to compel against Plaintiffs (*see* Dkt. No. 1016, January 17, 2007, Order and Dkt. No. 1063, February 26, 2007, Order), the Tyson Defendants have not previously sought an award of fees and expenses pursuant to Rule 37. Unfortunately, this Court’s prior Orders, unaccompanied by Rule 37 sanctions, have not chastened Plaintiffs, who continue to disregard the Federal Rules and this Court’s Orders.

Plaintiffs’ gamesmanship forced Tyson to file the Second Motion to Compel and the Court to hear argument on that motion. This was unwarranted and unnecessary. Plaintiffs’ objections to Tyson’s April 25, 2007, Requests for Production were clearly unfounded. Their refusal specifically to identify documents responsive to those requests as required by Rule 34 was especially egregious given this Court’s prior order on that same subject. *See* Dkt. No. 1150, May 17, 2007. Accordingly, this Court granted Tyson’s Second Motion to Compel. *See* Oct. 24, 2007, Opinion and Order, at pp. 4-5 (Dkt. No. 1336). Under Rule 37(a)(4)(A), and to deter similar discovery abuses by Plaintiffs, this Court should require Plaintiffs to reimburse Tyson for its reasonable expenses and attorneys’ fees in the amount of \$4,150.58 associated with the Second Motion to Compel. An affidavit supporting reasonable expenses and attorneys fees is attached hereto as Exhibit 1.

### III. CONCLUSION

Plaintiffs' improper conduct necessitated Tyson's Second Motion to Compel. Having granted the motion, this Court should require Plaintiffs to reimburse Tyson's reasonable expenses and attorneys' fees under Rule 37(a)(4)(A) in the amount of \$4,150.58. *See* Ex. 1.

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## **CERTIFICATE OF SERVICE**

I certify that on the 26th day of October 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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